VELLASAMY PONNUSAMY & ORS v. GURBACHAN SINGH BAGAWAN SINGH & ANOR

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
KAMALUDIN MD SAID JCA
[CIVIL APPEAL NO: A-02(IM)-2368-11-2018]
18 JUNE 2020

CIVIL PROCEDURE: *Assessment of damages – Application for – Delay – Whether delay was for valid reasons – Whether application breached O. 37 r. 1 of Rules of Court 2012 – Whether O. 37 to be read with O. 34 – Whether other party or court should have fixed assessment of damages where plaintiffs failed to do so – Whether reading O. 37 in isolation would lead to miscarriage of justice*

On 27 November 2014, the Federal Court ordered an assessment of damages. On 19 December 2017, the appellants ('plaintiffs') filed encl. 20 for extension of time for assessment of damages as per the Federal Court's order. The respondents opposed encl. 20 on the grounds that (i) it was filed out of time; (ii) it was in breach of O. 37 r. 1 of the Rules of Court 2012 ('ROC'); and (iii) some of the plaintiffs had passed away and no order for substitution of parties under O. 15 r. 7 of the ROC was made. The High Court ruled that there was an inordinate delay in filing encl. 20 and thereby dismissed the application. Hence, the appeal, wherein the plaintiffs submitted, *inter alia*, that: (i) the delay in making the application for assessment in the High Court was for valid reasons including an application to vary the judgment of the Federal Court which took considerable time; (ii) O. 37 r. 1 of the ROC did not apply in this case as the Federal Court gave a direct order for a judge of the High Court Ipoh to assess the damages; they specifically did not want the assessment to be done by a Registrar; and (iii) O. 37 r. 1(1) is not mandatory.

Held (allowing appeal with costs; dismissing cross-appeal with no order as to costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Order 37 *per se* does not take away substantive rights. It only requires the parties to expeditiously file for order for assessment of damages within one month. Order 37 must be read with O. 34. Order 34 is a cardinal provision for the court to ensure that all proceedings are proceeded justly, expeditiously as well as economically. The phrase 'shall' is not mandatory in nature as it also allows the opposing party to file directions as well as the court in its own motion to set the matter

for case management if the application is not made within a month. In addition, a six-month period is given to the opposing party to make such an application under O. 37 r. 1(7) keeping the subject matter of assessment open until some action is taken by parties or the Registrar. It will be travesty of justice to allow the respondents to object on the ground of non-compliance when they were given the right to remedy the breach. Thus, reading O. 37(1) of the ROC in isolation would lead to miscarriage of justice. (paras 6, 12 & 17)

(2) The assessment for damages order was related to the Federal Court order. The respondents or the court should have fixed for assessment of damages in the event the plaintiffs had not done so. In addition, there was no unless order or pre-emptory order made by the court in the first instant to move to deprive the plaintiffs the right to assessment of damages. (para 17)

(3) The passing away of some of the plaintiffs was a non-issue. In addition, the cross-appeal would also collapse if the order of the High Court in encl. 20 was set aside. Pursuant to s. 69 of the Courts of Judicature Act 1964 as well as per the application of encl. 20, the court directed the assessment of damages to be proceeded as per the order of the Federal Court without any further delay. (paras 17 & 18)

Case(s) referred to:

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Kailash v. Nanhku [2005] 4 SCC 480 ***(refd)***

Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal [2017] 1 LNS 2086 CA ***(refd)***

Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd [2017] 5 CLJ 150 CA ***(refd)***

Md Amin Md Yusuf & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***

Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Putra & Ors [2017] 1 LNS 422 HC ***(refd)***

Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals [2017] 10 CLJ 296 CA ***(refd)***

State Of Nagaland v. Lipok Ao & Ors AIR 2005 SC 2191 ***(refd)***

Tetuan Sri Ling & Associates v. Lian Meng Wah [2015] 3 CLJ 63 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69

Rules of Court 2012, O. 1A, O. 34, O. 37 r. 1(1), (3), (7)

Rules of the High Court 1980, O. 34

Other source(s) referred to:

Janab's Key To Civil Procedure, 6th edn, pp 152-153

For the appellants - Ambiga Sreenevasan, DP Vijandran & Ragunath Kesavan; M/s DP Vijandran Assocs

For the respondents - Malik Imtiaz & Rabinder Singh; M/s Bachan & Kartar

[Editor's note: For the High Court judgment, please see Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan & Ors [2019] 10 CLJ 257 (overruled).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellants' (plaintiffs) appeal is principally related to the construction of O. 37 of the Rules of Court, and it arises from their application of encl. 20 in the High Court *inter alia* to condone delay. The appellants have not filed an application for direction for assessment of damages within one month from the date of an order or judgment, and on that ground, the learned High Court Judge in reliance of the Court of Appeal's decision as well as the decisions of the High Court had ruled that there was inordinate delay in filing encl. 20 and thereby dismissed encl. 20.

[2] Parties have relied on the following cases:

(1) *Chong Keat Realty S/B v. Ban Hin Lee Bank* [2003] 3 CLJ 532; (2) *Hee Nyuk Fook v. Public Prosecutor* [1989] 2 MLJ 360; (3) *Coles and Ravenshear* [1907] 1 KB 1, 4.; (4) *Md Yusoff bin Ahmad v. Siti Hajar* [2013] 1 MLJ 329; (5) *Miss Rossarin Nuekaew v. PP* [2017] 5 MLJ 1; (6) *JMB Silverpark Resort v. Silverpark S/B* [2015] 1 LNS 890; (7) *TWT Hardware Sdn Bhd v. RHB Bank* [2017] MLJU 598; (8) *Petra Perdana Bhd v. Tengku Dato' Ibrahim* [2017] 3 AMR 849; (9) *H.Nusantra Nilam Sdn Bhd v. Hicks Flat JMB* [2018] 1 LNS 817; (10) *Tenaga Nasional Bhd v. Ong See Teong* [2010] 2 MLJ 155; (11) *Tetuan Sri Ling v. Lian Meng Wah* [2015] 3 CLJ 63; (12) *Duli Yang Amat Mulia Tunku Ibrahim v. Datuk Captain Hamzah Mohd Noor and Another Appeal* [2009] 4 MLJ 149; (13) *Pengarah Jabatan Hutan v. Sykt Sebati Sdn Bhd* [2017]2 MLJ 670; (14) *Konsortium Lebuhraya Utara v. Liew Choong Kin* [2017] LNS 2029; (15) *United Malayan Banking Corp Bhd v. Ernest* [2001] 1 MLJ 561; (16) *National Union of Bank Employees v. D-G Trade U* [2013] 6 MLJ 167; (17) *Keruntum Sdn Bhd v. Director of Forests* [2017] 3MLJ 281; (18) *Bank Pembangunan Malaysia Bhd v. Abdul Razak* [2004] 2 MLJ 15; (19) *A2i Co LTD v. MiTV Corporation Sdn Bhd* [2016] 1 LNS 716; (20) *YB Ding Kuong Hiing v. Dr Wong Hua She* [2016] 1 LNS 557; (21) *Mohd Karim bin Abas v. Ketua Pengarah* [2013] 4 MLJ 420; (22) *Malayan Banking Bhd v. The Official Assignee* [1993] MLJU 416; (23) *Foo Nyit Tse v. Yew Chee Seong & Anor* [1934] MLJ 2014; (24) *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178; (25) *Koperasi Rakyat Bhd v. Harta Empat Sdn Bhd* [2000] 3 MLJ 178; (26) *Manokaran Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209; (27) *Dato' Tan Heng Chew v. Tan Kim Hor* [2006] 2 MLJ 293; (28) *Jmb Silverpark Resort v. Silverpark Sdn Bhd* [2015] MLJU 863; (29) *Prudentials Sdn Bhd v. YM Tengku Abdul Halim Ibni Almarhum Sultan Ibrahim* [2016] MLJU 682; (30) *Ali Jeman v. Indranika Jaya Sdn Bhd & Ors* [2016] 1 LNS 1795; (31) *Mat Jim Wahab v. Nagasteel Equipment Sdn Bhd & Anor* [2018] 7 CLJ 105; (32) *Lucy Wong Nyuk King (f)*

A *& Anor v. Hwang Mee Hiong (f)* [2017] 1 LNS 2256; (33) *Diljit Kaur a/p Puran Singh v. Majlis Peguam Malaysia* [2015] 7 MLJ 695; (34) *Liau Kim Lian v. Bajuria* [1971] 1 LNS 63; [1971] 1 MLJ 276; (35) *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583; (36) *Koay Hean Khoon v. Abdul Jamil Abdul Mutalib & Anor* [2015] 8 CLJ 410; (37) *Ng Bak Soon & Ors v. Lee Chin Yen & Anor* [2014] 1 LNS 1548; (38) *Gan Yook Chin (P) & Anor v. Lee Ing Chin*
B *@ Lee Teck Seng & Ors* [2004] 4 CLJ 309; (39) *Bank Utama (Malaysia) Bhd v. Sistem Bis Komputer Sdn Bhd & Ors* [1994] 3 MLJ 452; (40) *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; (41) *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453; (42) *Vellasamy a/l Ponnusamy & Ors v. Gurbachan Singh a/l Bagawan Singh & Ors*
C [2006] 2 MLJ 715; (43) *Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v. Gurbachan Singh a/l Bagawan Singh & Ors* [2010] 5 MLJ 437; (44) *Sahari bin Basri & Anor v .Kerajaan Negeri Selangor & Ors* [2014] 10 MLJ 270; (45) *Gurbachan Singh s/o Bagawan Singh & Anor v. Vellasamy s/o Pennusamy & Ors and Other Applications* [2012] 2 MLJ 149;
D (46) *Gurbachan Singh s/o Bagawan Singh & Ors v. Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and Other Appeals* [2015] 1 MLJ 773; (47) *Tradium Sdn Bhd v. Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668; (48) *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1996] 2 MLJ 57; (49) *Te Cheng Hoi v. Peh Im Kweng* [1994]
E 2 MLJ 547; (50) *Lagenda Kencana Sdn Bhd v. Peter's Holdings Sdn Bhd & Anor* [2012] 4 MLJ 855; (51) *Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd* [2006] 1 MLJ 746; (52) *China Airlines Ltd v. Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517.

[3] The dismissal of encl. 20 literally means that notwithstanding liability
F issue was settled in the plaintiffs' favour, there will be no damages or compensation, etc. for the plaintiffs arising out of the suit.

[4] It must also be noted that the Federal Court in this case had directed for assessment of damages and that part of the order read as follows:

G (g) we hereby order that there shall be assessment for damages to be paid by the first and second appellants to the respondents which is to be held before a High Court judge preferably stationed in the High Court Ipoh, Perak. Thus to that extent we vary the order of the majority that the assessment is to done by a Senior Assistant Registrar, Ipoh Perak;

H (h) we further order that when doing the assessment the value of the respondents' shares or plots in the estate land and the profits flowing from the sale of the estate land (to be adjusted according to acreage representing the respondents' shares) must be taken into account;

I (i) we further order that in the exercise of our discretion the expenditure incurred by the first appellant is to be deducted from the assessed damages and profits.

Preliminary Jurisprudence

[5] To appreciate the issues which need to be resolved in this case, some basic jurisprudence need to be set out. They are in general as follows:

(i) Limitation Act for cause of action stops once the originating process is issued;

(ii) A cause of action has two substantive rights, one is liability and the other is the relief;

(iii) Once liability is established, appropriate relief must be granted;

(iv) Once the matter has been filed in court, the Rules of Court cannot take away any of the substantive rights by rules of procedure.

[6] The reading of O. 37 *per se* does not take away substantive rights. It only requires the parties to expeditiously file for order for assessment of damages within one month. If the winning party does not file, the losing party can do so. If both do not file, there is an obligation for the court to give directions rather than striking out the substantive rights as set out in O. 34 (case management proceeding). Order 37 r. 1(1) cannot be read in isolation. It has to be read as among others with O. 37 r. 1(3), (7), etc. as well as O. 34 inclusive of O. 1A.

[7] Learned counsel for the respondent had relied on the Court of Appeal's decision of *Tetuan Sri Ling Associates v. Lian Meng Wah* [2015] 3 CLJ 63, to which we are not in agreement for reasons stated in this judgment. There are sufficient authorities in our law books to say that merit must be preferred to technicalities notwithstanding there are other decisions which also say otherwise. To some extent, the Court of Appeal in *Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal* [2017] 1 LNS 2086; [2017] MLJU 2095, had considered the divergence in view and observed *inter alia* as follows:

> [19] From decided cases, it can be seen that courts take two different approaches on issues raised in the trial court or appellate court to reach a decision. One is a narrow or adversarial approach where substantive justice is not foremost in the mind of the courts. The courts under this approach only deals with what was argued by the parties before the court related to the facts, rules and/or law. For ease of reference, we will call this narrow approach as judicial application of micro-jurisprudence. *The other approach is overall and/or inquisitorial approach and/or holistic approach to decide on the facts and law who should succeed to attain substantive justice as opposed to who should win based on procedure or technicalities per se.* For ease of reference, we will call this holistic approach as judicial application of macro-jurisprudence.

A [20] The common law courts a few centuries back were not supportive of substantive justice, when procedure and/or technicalities were raised by a litigant to defeat substantive justice. In the application of micro-jurisprudence, the court will hear the issues or objections which have been placed before them and the rules, procedure or legislation or case laws which were referred to them only and make a decision. In short, it was
B a game of adversarial justice and not substantive justice. (See *Sir Jack I.H. Jacob, The Reform of Civil Procedural Law and other Essays in Civil Procedure*, London Sweet & Maxwell London, 1982).

[8] In addition, the appellants have bolstered their arguments as follows:

C (i) In *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin* [2017] 10 CLJ 296, the Court of Appeal through Your Lordship Justice Hamid Sultan JCA held that it is not an option anymore for the courts to strike out a matter for non-compliance of the Rules of Court 2012 without first giving an opportunity to the litigant to regularise the proceedings or to condone the irregularity by the fiat of the court. It is only in extremely
D rare cases where the non-compliance cannot be condoned at all, the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs.

E (ii) In *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532, Gopal Sri Ram JCA held:

Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasised that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. *So, when a party to litigation*
F *complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the answer to this*
G *Question that will ultimately determine whether the court should uphold or reject a procedural complaint.*

(iii) In *Kailash v. Nanhku* [2005] 4 SCC 480, the Indian Supreme Court held:

Three things are clear. Firstly, a careful reading of the language in which Order VIII, Rule 1 has been drafted, shows that it casts an obligation on
H the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order VIII, Rule 1 is
I procedural. It is not a part of the substantive law. Thirdly, the object

behind substituting Order VIII, Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. *The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.*

All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the *process of justice dispensation.* Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in *Sushil Kumar Sen v. State of Bihar* (1975) 1 SCC 774, are pertinent:

The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic seguel/otherwise would be wholly inequitable. Justice is the goal of jurisprudence processual, as much as substantive.

In *The State of Punjab and Anr. v. Shamlal Murari and Anr.* (1976) 1 SCC 719, the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice." In *Ghanshyam Dass and Ors. v. Dominion of India and Ors.* (1984) 3 SCC 46, the Court reiterated *the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to sub- serve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle,*

... In *Sangram Singh v. Election Tribunal, Kotah & Anr.* (1955) 2 SCR 1, this Court highlighted 3 principles while interpreting any portion of the CPC. They are:

(i) A code of procedure must be regarded as such. *It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties: not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.*

A ... Justice G.P. Singh notes in his celebrated work "*Principles of Statutory Interpretation*" (Ninth Edition, 2004) while dealing with mandatory and directory provisions – "The Study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, *and regard must be had to the context, subject-matter and object of the statutory provision in Question, in determining whether the same is mandatory or directory.* In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered'." (p. 338) "For ascertaining the real intention of the Legislature", points out Subbarao, J. "the court may consider *inter alia*, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the noncompliance with the provisions; the fact that the noncompliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered". If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

(iv) In *State Of Nagaland v. Lipok Ao & Ors* AIR 2005 SC 2191, the Indian Supreme Court held:

F This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. *When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal* ... The delay was accordingly condoned.

[9] From the above authorities, it is pertinent to note as submitted by the appellant as follows:

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Indian cases have also consistently established that substantial justice must not be defeated by procedural technicalities. They have also held that if by holding a procedural rule as mandatory, serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as merely directory.

[10] Order 37 of RC 2012 reads as follows:

Assessment of damages by Registrar (O. 37, r. 1)

1(1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.

(2) On the hearing of the application for directions, the Registrar may, in addition to making such orders as are necessary and appropriate under Order 34, give directions as to the time by which a notice of appointment for assessment of damages shall be filed and such notice upon being filed shall, notwithstanding anything in Order 62, rule 10, be served not later than seven days thereafter on the party against whom the judgment is given. Notice of appointment for assessment of damages shall be in Form 62A.

(3) If the party entitled to the benefit of the judgment fails to comply with paragraph (1), the Court may, on the application of the party against whom the judgment is given, proceed to assess damages or make such other order as it thinks just.

(4) The attendance of witnesses and the production of documents before the Registrar in proceedings under this Order may be compelled by subpoena, and the provisions of Order 35 shall, with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at the trial.

(5) Subject to any direction given by the Registrar pursuant to this rule, the party entitled to the benefit of the judgment shall file a notice of appointment for assessment of damages within six months of the date of judgment.

(6) A party shall not file a notice of appointment for assessment of damages by the Registrar pursuant to this rule unless directions for filing and exchange of affidavit evidence pursuant to Order 34 have been given or complied with, as the case may be.

(7) If that party does not file the notice of appointment for assessment of damages within the prescribed period, any other party may apply for directions.

[11] The innovation under the RC 2012 as opposed to Rules of the High Court 1980 (RHC 1980) is that it has imposed a duty on the court to case manage the file, to set matters down for trial or hearing of any form of application. Thus, it is now an inquisitorial approach and not an adversarial approach where parties have to seek directions. In essence, the court by rules of procedure has to hear matters on merit and take conduct of all matters before it and give appropriate direction. There is no provision for striking out for inordinate or contumelious delay unless parties have obtained unless orders and/or pre-emptory orders. Even before RC 2012 was introduced, the Court of Appeal in *Md. Amin Md Yusuf & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88; [2004] 4 AMR 449, in dealing with O. 34 of RHC 1980 had held:

(a) Order 34 of the Rules of the High Court 1980 (RHC) provides for the procedures and powers of the High Court in pre-trial case management so that an action could be brought to trial in a timely manner.

(b) The procedure provides for the courts control of the progress of a case to enable the court, and not the parties concerned, to dictate the progress of the case at the pretrial stage and to ensure that the practices and procedures applicable during that stage are complied with promptly and not abused.

(c) Rule 7 of Order 34 provides a judge with the discretionary power to make such an order against a defaulting party "as meets the ends justice" should there be a failure to comply with any direction emanating from any pre-trial case management conference.

(d) On the facts, the learned judge overlooked the fact that the respondent had also failed to comply with paragraph (e) of the learned judge's directions.

(e) The failure to comply with the directions was not intentional or contumelious justifying the drastic action taken by the learned judge.

(f) The learned judge proceeded immediately to strike out the appellants' counterclaim after hearing the respondent's submissions.

(g) The learned judge's decision was fatally flawed and wrong in principle, which resulted in injustice to the appellants who were consequently deprived of their right to have their counterclaim heard on merit.

(h) This was a proper case for appellate interference.

[12] Order 37 of RC 2012 must be read with O. 34. In addition, the phrase 'shall' is not mandatory in nature as it also allows the opposing party to file directions as well as the court in its own motion to set the matter for case management if the application is not made within a month. In addition, a six

month period is given to the opposing party to make such an application under O. 37 r. 1(7) keeping the subject matter of assessment open until some action is taken by parties or Registrar. It will be travesty of justice to allow the defendants to object on the ground of non-compliance when they are given the right to remedy the breach. Thus, reading O. 37 r. 1(1) of RC 2012 in isolation will lead to miscarriage of justice. We note that in the case of *Petra Perdana Bhd v. Tengku Dato' Ibrahim* [2017] 1 LNS 422; [2017] 3 AMR 849, the learned Judicial Commissioner had dealt with O. 37 quite extensively to rule it is not mandatory.

[13] The overriding objective of RC 2012 requires court to condone non-compliance. Learned authors *Janab's Key To Civil Procedure*, 6th edn, revised by Dato' Mah Weng Kwai and Arun Kasi make the following observations at pp. 152 to 153:

> **(b) Overriding Objective**
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> One of the important principles entrenched in CPR 1998 in England is the concept of "overriding objective" which is to deal with cases justly. The court has to give effect to the overriding objective in all stages of proceedings, inclusive of decision-making process and when interpreting the rules. This concept requires the judge to actively manage the case from the time of commencement.
>
> …
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> The primary function of the courts from time immemorial is to dispense justice. Where courts decline to hear cases on merits but are inclined to dismiss cases on technicalities then the primary purpose for the courts' existence is defeated. The English Courts in applying principles of 'overriding objective' enunciated in CPR 1998 had condoned technical as well as procedural breaches. In *Jones v. Telford* (The Times, 29 July 1999), the Court of Appeal stated that the court must not lose sight of the fact that its primary concern is to dispense justice. In this case, service had been delayed beyond the period of validity. The reason was that the plaintiff's solicitor had difficulties in obtaining psychiatric reports for service with the particulars of claim. The Court of Appeal upheld an extension of time. (See *Chilton v. Surrey Country Council* (1999) LTL 24/6/99; *Carla Homes (South) Ltd v. Chichester District Council*, The Times, 15th October 1999).

Brief Facts And Grounds

[14] The brief facts and the grounds of judgment which have been placed before us in a rudimentary manner are set out below to save court's time. It reads as follows:

Brief facts:

1. Previously, the Federal Court on 27.11.2014 had ordered that "an order that there shall be assessment of damages …". After several months of the Federal Court order, there were 2 motions filed at the Federal Court to vary the judgment (1st motion) and to discharge the plaintiff's solicitor (2nd motion). Both motions were dismissed on 27.6.2016.

2. Later, at the High Court, 119 proposed interveners applied to intervene in the proceedings. The application to intervene was withdrawn later on 1.11.2017.

3. The plaintiffs/appellants/PP then filed encl.20 for extension of time to go for assessment of damages as per the Federal Court order which is the subject matter of the appeal herein. Encl. 20 was filed on 19.12.2017.

4. The 1st & 2nd defendants/respondents/DD opposed encl. 20 because it was filed out of time and in breach of O. 37 r. 1 of ROC 2012 (direction for assessment of damages to be made within 1 month). P1 and P4 had passed away. No order for substitution of parties under O. 15 r. 7 was made. P2 does not have the authority to file encl. 20 and affirm encl. 21 (affidavit in support) on behalf of P1 and P4.

5. PP explained the delay that the Federal Court order had issues that the relief was only granted to 217 persons where the case involved with 600 purchasers. There was a need for PP to discuss with the other sub-purchasers. PP instructed their solicitor to postpone any action until the discussion were over. This is where the 1st motion was filed at the Federal Court to vary the Federal Court order. PP also explained that the delay was also caused by the actions of the executor of P4 which is where the 2nd motion came in. PP also has to wait for the withdrawal of the application to intervene to file encl.20 herein. Any prejudice caused to DD could be compensated with costs.

6. High Court: PP's application in encl. 20 for extension of time to go for assessment of damages as per the Federal Court's order dated 27.11.2014 was dismissed with costs of RM5000.

7. Notice of Appeal is against the whole of the High Court's decision.

8. Notice of Cross-Appeal is against part of the High Court's decision that decided D1&D2's rights had been accrued since 1.12.2009 (Court of Appeal order) where it should have accrued since 27.11.2014 (Federal Court order).

Grounds of Decision of High Court

Whether PP's application in encl. 20 should be allowed.

1. Parties agreed that they were in breach of O. 37 r. 1 of ROC 2012 (direction for assessment of damages to be made within 1 month). O. 37 r. 1(3) is mandatory. No application was made within time. The Federal Court order does not amount to a provision made as to how they are to be assessed. The order for assessment was made after the coming of ROC 2012. Even if the Rules of High Court applies instead of ROC 2012, it must be read with s. 54(2) of the Interpretation Act that it should be done "with all convenient speed". The delay of filing this application is 3 years.

   The delay had prejudiced D1 as land is always deemed in law to have special value on the basis that its price will rise. The unnecessary accumulation of interest to the judgment debtor's detriment could have been avoided.

[15] The memorandum of appeal reads as follows:

1. The Learned Judicial Commissioner erred in law and fact in dismissing the interlocutory application of the Plaintiffs dated 19.12.2017.

2. (a) The Learned Judicial Commissioner of the High Court (hereinafter "the Learned Judicial Commissioner"), erred in law and fact in not considering and/or not giving dues weight to the fact that the Plaintiffs herein had assiduously pursued their claim through 23 years of litigation and would not, and in fact, did not deliberately, delay proceedings for assessment of damages against their own interest.

   (b) The Learned Judicial Commissioner erred in law and fact in not considering and/or not giving dues weight to the fact that the Plaintiffs herein would lose the fruits of their litigation.

3. (a) The Learned Judicial Commissioner erred in law and fact in failing to consider that the Defendants had failed to allege any prejudice to them in their affidavit in reply.

   (b) The Learned Judicial Commissioner erred in law and fact in not considering the above in relation to sub-order O. 37 r. 1(3) which specifically provides for the Defendants to apply for assessment if the Plaintiffs fail to do so within the 1 month provided in O. 37 r. 1(1).

   (c) In this context, the Learned Judicial Commissioner erred in law and fact in not appreciating the true purpose of the avenue provided in O. 37 r. 1(1), (3).

   (d) The Learned Judicial Commissioner erred in law and fact in not giving due consideration to the fact that despite the avenue provided to the Defendants under O. 37 r. 1(1), (3), the Defendants stood idly by and took no steps.

A

4. (a) The Learned Judicial Commissioner erred in Law in holding O. 37 r. 1(1) of ROC 2012 as being mandatory.

(b) The Learned Judicial Commissioner erred in Law by reading O. 37 r. 1(1) disjunctively when this Sub-Rule 1 ought to be read conjunctively with Sub-Rule 3 to determine the structure and true purport of the whole Order.

B

5. The Learned Judicial Commissioner erred in Law in failing to differentiate between the situation where the Federal Court had given a direct order appointing a High Court Judge to assess the damages and a High Court Order to the Registrar to assess the damages under Order 37 of the Rules of Court.

C

6. The Learned Judicial Commissioner erred in law and fact in failing to consider significant factors leading up to the Plaintiffs' application for assessment of damages.

7. The Learned Judicial Commissioner erred in law and fact in holding himself absolutely bound by the Court of Appeal case of *Tetuan Sri Ling & Associates v. Lian Meng Wah* [2015] 3 CLJ 63 ("*Sri Ling* case") in (a) misconstruing that case; and/or (b) without considering and/or give weight to the several valid distinguishing factors between that case and the current case.

D

8. The Learned Judicial Commissioner erred in law and fact in giving weight to the fact that the *Sri Ling* case was not referred to in the case of *Petra Perdana Berhad v. Tengku Dato' Ibrahim Petra* [2017] 1 LNS 422 relied on by the Plaintiffs.

E

9. (a) Although holding that the substantive rights of the Plaintiffs under the Court of Appeal judgment must be preserved under the RHC 1980, The Learned Judicial Commissioner erred in law and fact in holding that the provisions of s. 2(1)(e) and 54(2) of the Interpretation Act should apply in the absence of a prescribed period.

F

(b) The Learned Judicial Commissioner erred in law and fact:

G

(i) in holding that the prescribed period should be according to the Interpretation Act and therefore should be "with all convenient speed".

(ii) in failing to hold that the Plaintiffs had in the circumstances proceeded "with all convenient speed".

H

10. The Learned Judicial Commissioner erred in law and fact in stating that there was a gap of 8 years between the judgment of the Court of Appeal and the application to assess damages without taking into consideration the many intervening events which included: two leave applications to the Federal Court by the Defendants; an application by the Defendants for revision of the 1st Federal Court leave application; an appeal to the Federal Court by the Defendants; an application for revision by the Plaintiffs and an application to vary the Federal Court judgment by the Plaintiffs.

I

11. The Learned Judicial Commissioner made a fundamental error of fact in holding that "... the number of sub-purchasers was never an issue in this at any stage of the proceedings right up to the Federal Court. At all material times the number of sub-purchasers reminded (*sic*) at 217.

    This finding flies in the face of the specific findings of the Court of Appeal which made specific orders extending the purchasers beyond 217 to include all the sub-purchasers (numbering about 600) and appointing the named Plaintiffs as Trustees for all the sub-purchasers.

12. The Learned Judicial Commissioner erred in law and fact in holding that the application in Enclosure 1 by Manoharan cannot be a reason for delay and not giving weight to the fact that in that said application the authority of the current solicitors was being challenged and they had already filed an application to assess damages. This issue had to be settled as a preliminary issue.

13. (a) The Learned Judicial Commissioner erred in law in raising the point and holding that the Defendants would be prejudiced as the Land value would appreciate and that damages will consequently increase on account of the delay. The Learned Judicial Commissioner failed to realise that the time for assessment is frozen as on the date of Judgment with subsequent increase or decrease in value being irrelevant for the computation of damages.

    (b) The Learned Judicial Commissioner erred in law when he held that the Defendants would have to pay additional interest on the damages as a result of the delay. In doing so the Learned Judicial Commissioner failed to consider the following factors:

    (i) A Judge assessing damages has discretion to reduce interest for any period of delay unreasonably caused by the Plaintiffs.

    (ii) If the Defendants were concerned about increased interest they could have mitigated the same by applying under O. 37 r. 1(1), (3).

    (c) The Learned Judicial Commissioner erred in law in making the above findings of prejudice when the Defendants had not pleaded any prejudice whatsoever in their Affidavit.

[16] The appellants' executive summary reads as follows:

1. Intro

2. The High Court judgment is two-pronged: (a) the first part considering whether O. 37 r. 1 of the ROC 2012 is mandatory and (b) the second part holding that ROC 2012 rules do not apply and applying O. 37 of the old RHC 1980.

A

3. **Re Part I –The Mandatory decision**

4. The Plaintiffs have pursued this case for 22 years from the High Court to the Federal Court and back.

5. The delay in making the application for assessment in the High Court was for valid reasons including an application to vary the judgment of the Federal Court which took considerable time.

B

6. We submit firstly that O. 37 r. 1 does not apply in this case as the Federal Court gave a direct Order for a Judge of the High Court Ipoh to assess the damages. They specifically did not want the assessment to be done by a Registrar. Order 37 deals only with assessments by the Registrar. This is further bolstered by O. 37 r. 4(b) which states that whenever a judgment orders that assessment of damages shall proceed before a Judge (instead of Registrar), pre-trial case management directions with the necessary modifications pursuant to O. 34 applies – and not O. 37 r. 1(1).

C

D

7. Secondly, we submit that O. 37 r. 1(1) is not mandatory:

   (a) The whole structure of O. 37 is against a mandatory interpretation;

   (b) Especially since O. 37 provides that if the Plaintiffs do not apply for assessment within 1 month, the Defendant may apply instead under O. 37 r. 3 and r. 7.

E

   (c) In any case the modern court approach is not simply to label a provision as mandatory but to consider the purpose and structure of the provision in context and examine it with the overriding objective of justice

F

   (d) An important consideration is whether prejudice has been caused to the Defendants. The Defendants have not even raised any hint of prejudice in their affidavit in opposition. In any case there was no prejudice.

8. Plaintiffs had to make their application to assess with all convenient speed.

G

10. We have submitted that in holding that the Plaintiffs had not acted with all convenient speed, the Learned Judge fell into serious error in basing his decision on factual errors.

11. **Conclusion**

H

12. It is in the interest of justice that the Plaintiffs are not deprived of the fruits of litigation wherein they have seriously and patiently pursued their claims for 22 years.

13. On the basis of the foregoing, we pray that this Appeal be allowed.

I

[17] We have read the appeal records, the cross-appeal and the preliminary objection raised by the respondents that the first and fourth plaintiffs had passed away and there was no substitution order. After giving much consideration to the submissions of learned counsel for the respondents, we take the view that the appeal must be allowed and the cross-appeal be dismissed. Our reasons *inter alia* are as follows:

(i) In this case, we take note that the learned Judicial Commissioner has written a meticulous judgment and had placed reliance on the Court of Appeal's decision in *Tetuan Sri Ling & Associates v. Lian Meng Wah* [2015] 3 CLJ 63, which is supportive of the respondents' argument. It must also be noted that a different coram of the Court of Appeal had taken the view that O. 34 needs to be considered when dealing with O. 35, O. 37 and other provisions of the Rules. (See *Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd* [2017] 5 CLJ 150). In essence, O. 34 is a cardinal provision for the court to ensure that all proceedings are proceeded justly, expeditiously as well as economically. Thus, the room for depriving a substantive right is narrowed down in contrast to the old Rules of Court.

(ii) The application in encl. 20 of the RC 2012 was specifically related to O. 37 r. 1. We have answered the jurisprudence related to O. 37 r. 1 in our caption titled as 'preliminary jurisprudence'.

(iii) We find that the appellants' submissions have merits. In addition, the assessment for damages order was related to the Federal Court order. In the instant case, the respondent or the court should have fixed for assessment of damages in the event the appellants have not done so. In addition, there was no unless order or pre-emptory order, made by the court in the first instant to move to deprive the appellants the right to assessment of damages.

(iv) The passing away of some of the appellants on the facts is in our view a non-issue. In addition, the cross-appeal will also collapse if the order of the High Court on encl. 20 is set aside, and the prayers sought in encl. 20 is allowed.

[18] For reasons stated above, the appeal is allowed with costs. The cross-appeal is dismissed with no order as to costs. Pursuant to s. 69 of the Courts of Judicature Act 1964 as well as per the application of encl. 20, we direct that the assessment of damages to be proceeded as per the order of the Federal Court without any further delay.

[19] The matter is to be fixed for case management before the High Court within one week from the date of this order for the High Court to give direction on assessment of damages. We hereby ordered so.